86 FLRR 1-1733

Department of Justice, Immigration and Naturalization Service, United States Border Patrol, Laredo, Texas and American Federation of Government Employees, National Border Patrol Council, Local 2455

Federal Labor Relations Authority

6-CA-30309; 23 FLRA No. 10; 23 FLRA 90

August 12, 1986

Judge / Administrative Officer

Before: Calhoun, Chairman; Frazier, Member

Related Index Numbers

44.329 Subjects of Bargaining, Conditions of Employment, Schedule, Schedule Changes

44.5221 Subjects of Bargaining, Management Rights, Title VII/Civil Service Reform Act of 1978, Section 7106(b)(1), Numbers/Types/Grades Assigned

72.611 Employer Unfair Labor Practices, Unilateral Change in Term or Condition of Employment, Indicia of Change

72.665 Employer Unfair Labor Practices, Unilateral Change in Term or Condition of Employment, Defenses to Unilateral Change, Management Prerogative

Case Summary

CHANGES IN SHIFT AND ROTATION SCHEDULES WHICH INVOLVED THE EXERCISE OF MANAGEMENT'S RIGHTS WERE NECESSARY FOR THE AGENCY TO PERFORM ITS MISSION AND WERE NONNEGOTIABLE. The union filed a grievance when it learned that the agency was planning a change in the shift and rotation schedules. The union also demanded bargaining. When the agency refused, the subject ULP charge was filed. It was held that the matter was nonnegotiable. The changes in the shift and rotation schedules which involved the exercise of management's section 7106(b)(1) rights were necessary for the agency to perform its mission. Since the changes were deemed necessary to permit the station to police the border and to perform its duties most effectively, the complaint was dismissed.

Full Text

DECISION AND ORDER

I. Statement of the Case

This case is before the Authority based on exceptions to the attached Administrative Law Judge's Decision filed by the General Counsel and the American Federation of Government Employees, National Border Patrol Council, AFL-CIO, Local 2455 (the Union). An opposition to these exceptions was filed by the Respondent. The complaint, as amended, basically alleged two things: the Respondent violated sections 7116(a)(1) and (5) of the Statute by failing to notify the Union and refusing to bargain over the procedures to be observed in implementing revisions in shift and rotation schedules and appropriate arrangements for employees adversely affected by such changes; and the Respondent violated sections 7116(a)(1) and (5) of the Statute by refusing to maintain the existing shift and rotation schedules to the maximum extent possible during the pendency of a question concerning representation (QCR).

II. Background

The facts are fully set out in the Judge's Decision. Briefly, they indicate that during the time the events in this case occurred, a question was pending concerning representation of, among others, employees located at the Respondent's Laredo Station.

In April 1983, the Union learned that the Respondent was planning a change in the shift and rotation schedules for employees of the Laredo Station. The Union filed a grievance based on management's failure to provide it with timely notice of the change and allow it to present its views on the matter. The parties met, also in April, at which time various elements of the proposed change were discussed. The Union then requested bargaining, which request was denied, and the new schedule was

implemented in May. Another shift and rotation change was implemented the following September. The Union received notification prior to this change but did not request bargaining.

III. Judge's Decision

The Judge recommended dismissal of the amended complaint in its entirety. As to the failure to maintain existing conditions of employment during the QCR, the Judge cited the Authority's decision in United States Department of Justice, United States Immigration and Naturalization Service, 9 FLRA 253 (1982), in which we determined that agency management is required to maintain existing conditions of employment, to the maximum extent possible, during the pendency of a QCR unless changes in those conditions of employment are required consistent with the necessary functioning of the agency. The United States Court of Appeals for the Fifth Circuit, on appeal, reversed certain of the Authority's unfair labor practices findings on the basis that the particular changes in that case involved the exercise of management's rights under the Statute, but stated that its decision "should not be read as invalidating the rule." United States Department of Justice, United States Immigration and Naturalization Service v. FLRA, 727 F.2d 481, 489 (5th Cir. 1984). Here, the Judge applied this rule to the particular circumstances of the case and found that the changes in shift and rotation schedules were required consistent with the necessary functioning of the agency and, also, were matters covered by section 7106(b)(1) of the Statute.*1 The Judge concluded, therefore, that there was no obligation to bargain over the substance of the changes. As to the other allegation of the complaint involving a refusal to bargain over procedures and appropriate arrangements of changes in the shift and rotation schedules, the Judge found that section 7116(d) of the Statute*2 barred processing of the unfair labor practice allegation concerning one of the changes and that the Union had failed to request bargaining over the other change.

IV. Positions of the Parties

The General Counsel excepted to a number of findings and conclusions of the Judge, specifically, the following: that the April meeting between the Respondent and the Union was a grievance meeting, that the grievance covered the May shift and rotation schedule changes; that the Union was given timely notice of the September changes; and that section 7116(d) of the Statute bars processing of the unfair labor practice allegation concerning the May shift and rotation schedule changes. Rather, the General Counsel argues that the Respondent unlawfully refused to bargain over the impact and implementation of the May and September shift changes. Further, the General Counsel asserts that the changes were not consistent with the necessary functioning of the agency so that their implementation during the pendency of a QCR violated sections 7116(a)(1) and (5) of the Statute.

The union excepted to the Judge's finding that the Union was given reasonable notice of the changes, arguing that the Respondent breached the parties' contractual requirement that at least 10 days' notice be given. The Union also argued that the subject of shift changes was within the duty to bargain. Finally, the Union expressed its disagreement with the Court's decision in Immigration and Naturalization Service v. FLRA.

The Respondent generally opposed the exceptions of the General Counsel and the Union. The Respondent also made certain arguments it wished the Authority to consider in the event the Judge's findings and conclusions were reversed.

V. Analysis

We find, as did the Judge, that the changes in the shift and rotation schedules which involved the exercise of management's section 7106(b)(1) rights were necessary for the Respondent to perform its mission; that is, the changes were consistent with the necessary functioning of the agency. As noted by the Judge in his Decision, the Respondent is engaged in law enforcement activities. The changes made were deemed necessary "to permit the Laredo Station to effectively police the border and to perform its duties

most effectively." Therefore, the Respondent's conduct in making these particular changes during the pendency of a question concerning representation was not violative of sections 7116(a)(1) and (5) of the Statute.

We also adopt the Judge's finding that no violation of the Statute occurred with respect to the Respondent's alleged failure to bargain over the procedures to be observed in implementing the changes as well as on appropriate arrangements for employees adversely affected by such changes. As to the changes in shift and rotation schedules that were implemented in May, we find that section 7116(d) of the Statute bars processing of this portion of the complaint. Record evidence indicates that a grievance was filed and processed with regard to this change. Therefore, the Union selected the procedure it wished to pursue and processing of the same issue as an unfair labor practice is precluded.*3

Finally, as to the change in shift and rotation schedules implemented in September, we find, as did the Judge, that the Union never requested bargaining after having received notice of the change. Therefore, the Respondent did not unlawfully refuse to bargain. U.S. Department of Treasury, Internal Revenue Service, Philadelphia Service Center, 16 FLRA 749 (1984); General Services Administration, 15 FLRA 22 (1984).

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision and the entire record in this case, and adopts the Judge's findings, conclusions and recommended Order. The Authority therefore concludes that the complaint must be dismissed.

ORDER

IT IS ORDERED that the complaint in Case No. 6-CA-30309 be, and it hereby is, dismissed.

Issued, Washington, D.C., August 12, 1986.

Jerry L. Calhoun, Chairman Henry B. Frazier III, Member FEDERAL LABOR RELATIONS AUTHORITY

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1. Section 7106(b)(1) of the Statute provides:

Sec. 7106. Management rights

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating --

(1) at the election of the agency; on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work [.]

2. Section 7116(d) of the Statute provides, in relevant part:

[I]ssues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

3. Compare Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 19 FLRA No. 17 (1985) and Department of Justice, Bureau of Prisons, Federal Correctional Institution, Butner, North Carolina, 18 FLRA No. 100 (1985).

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. 7101 et seq., 92 Stat. 1191, (hereinafter referred to as the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, 2410, et seq.

An unfair labor practice charge was filed on July 7, 1983 by Local 2455 American Federation of Government Employees, National Border Patrol Council, AFL-CIO*1 alleging that U.S. Immigration

and Naturalization Service, U.S. Border Patrol (hereinafter called Respondent or Border Patrol) violated sections 7116(a)(1) and (5) of the Statute. Based upon the foregoing on October 6, 1983 the General Counsel of the FLRA, by the Director of Region 6, issued a Complaint and Notice of Hearing. Respondent filed a timely Answer denying that it had violated the Statute.

A hearing was held before the undersigned in Laredo, Texas. Respondent, Charging Party and General Counsel of the FLRA were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Posthearing briefs were filed and have been fully considered.

Based upon the entire record in this matter,*2 my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material the Council has been the exclusive collective bargaining representative for a unit of Respondent's employees that includes those assigned to the Laredo Border Patrol Station. The Council and the United States Immigration and Naturalization Service (hereinafter called INS) were parties to a collective bargaining agreement, covering the aforedescribed unit, which expired on September 30, 1978. On January 19, 1978 the International Brotherhood of Police Officers (IBPO) filed a representation petition with the FLRA and an election was conducted. The Council filed timely objections and the FLRA issued a decision in which the objections were sustained and a second election ordered. The FLRA was sustained by the Fifth Circuit Court of Appeals. United States Department of Justice, United States Immigration and Naturalization Service, 9 FLRA 253 (1982) aff'd sub nom. United States Department of Justice, United States Immigration and Naturalization Service v. FLRA, 727 F.2d 481 (5th Cir., March 19, 1984). During the period the above-described representation case was pending, the Council continued to represent Respondent's employees and the parties continued to give effect and operate under the terms of the collective bargaining agreement.

The INS is divided into regions, one of which is the Southern Region, which are in turn divided into sectors which are in turn divided into stations. One of the sectors of the Southern Region is the Laredo Sector which contains the Laredo Station, among other stations. Approximately sixty-seven bargaining unit employees were employed at the Laredo Station during 1983. At all material times, William Selzer held the position of Chief Patrol Agent (CPA) of the Laredo Sector and Miguel Vallina occupied the position of Assistant Chief Patrol Agent (ACPA). Joe Trevino held the position of Patrol Agent In Charge (PAIC) of the Laredo Station and James Fulgham was the Assistant Patrol Agent In Charge (APAIC).

The Council had a president and five vice-presidents. The vice-presidents had responsibility at the regional level. Below the regional level, there are local presidents that had responsibility at the sector level. At all times material herein, Benito Lopez was the President of AFGE Local 2455, which covers the Laredo Sector.

On April 20, 1983 AFGE Local 2455 President Lopez asked PAIC Trevino whether rumors which were circulating concerning a change in the shift schedules were accurate. Trevino stated that on May 1, 1983 the shifts would in fact be rolled back two hours.*3 Lopez noted that the union had not received prior official notice of the proposed change and that there was insufficient time prior to the implementation date of May 1 for the union to submit proposals. Trevino stated that the change would go into effect on May 1, 1983.

On April 21, 1983 AFGE Local 2455 filed a grievance under the collective bargaining agreement concerning management's failure to provide the union with timely written notice of the proposed changes and to allow the union to present its views on the matter.*4 AFGE Local 2455's grievance stated:

In accordance with Article 32-Grievance

Procedure in the negotiated agreement between the American Federation of Government Employees National Border Patrol Council and the U.S. Immigration and Naturalization Service, I hereby submit this formal grievance on behalf of all union members and all Border Patrol Agents in the Laredo Station.

On April 20, 1983 PAIC Joe Trevino, of the Laredo Station, advised me, upon my request, that all Border Patrol Agents in the Laredo Station would be divided into eight (8) units or squads headed by one supervisor. PAIC Trevino also advised me that all the shifts would be rolled back two (2) hours. The new Shifts would be from 6A-2P, 2P-10P, 10P-6A, 9P-5A. Implementation, as stated by PAIC Trevino, would be on May 1, 1983.

PAIC Joe Trevino has violated Article 3 section G of the negotiated agreement between the American Federation of Government Employees National Border Patrol Council and the U.S. Immigration and Naturalization Service. Violations are that PAIC Trevino failed to notify in writing, The Union, of proposed changes in personnel policies, practices, or working conditions and that PAIC Trevino violated the same article by not allowing The Union, to present its views to the proposed change or its impact.

On April 22, 1983 Trevino and ACPA Vallina informed Lopez that they had reconsidered their decision to implement the change on May 1, 1983, and that there would be a meeting between management and the union on April 29, 1983, at 1 p.m. in Vallina's office to discuss the matter. During the afternoon of April 22, 1983, CPA Selzer gave the same information to Lopez. In addition, Selzer informed Lopez that since management did not intend to implement the change on May 1, he considered the grievance to be moot and did not intend to issue a written response to the grievance as is required by Article 32, Section E of the contract.*5

On April 29, 1983 a meeting was held between Respondent and AFGE Local 2455, as scheduled. Present for AFGE Local 2455 were Lopez, AFGE Local 2455 Treasurer Joe Bradley, and Conrado Villanueva. Present for Respondent were Vallina, Trevino, and Fulgham. This was a meeting held to discuss the grievance pursuant to provisions of Article 32E, Step II of the collective bargaining agreement. Vallina stated that Respondent intended to begin operating on an eight-shift system as opposed to the four-shift operation that existed at the time. Vallina further stated that employees would be selected for the various shifts under a draft system comparable to that used in professional football. AFGE Local 2455 requested more specific details concerning the draft system and the implementation of the change, but Respondent responded that the details of the plan had not yet been finalized. At the meeting on April 29, 1983 AFGE Local 2455 was not advised of the details such as the hours of the various shifts, the exact way the draft would work and the names of employees assigned to these shifts. At the close of the meeting, the Union requested a written copy of the proposed shift change. Vallina stated that he would relay this request to Selzer. Later, Vallina informed Lopez that Selzer had denied the request for a written copy without specifying any reason for the denial.

By letter dated May 9, 1983 AFGE Local 2455 set forth examples of adverse impact of the changes and requested to bargain concerning the proposed changes. By letter dated May 16, 1983 Selzer denied the bargaining request and stated the new shifts would be implemented. The new shift schedule was implemented on May 29, 1983.

A few days before the implementation date, Lopez found a copy of the new schedule marked "union" and a blank scheduling form in his mailbox. Lopez did not know who had put them there. According to the schedule, the hours of the shifts in the actual order of rotation were as follows: 12:00 a.m.-8:00 a.m., 5:00 p.m.-1:00 a.m., 10:00 p.m.-6:00 a.m., 4:00 p.m.-12:00 a.m., 2:00 p.m.-10:00 p.m., 6:00 a.m.-2:00 p.m. (signcutting),*6 6:00 a.m.-2:00 p.m. (regular day shift), and 8:00 a.m.-4:00 p.m.

Because border patrol agents would rotate to a new shift every two weeks, under this new shift and rotation schedule agents were assigned to work ten

weeks of consecutive night shifts. Under the prior four-shift system, employees worked six weeks of consecutive night shifts. The change to the eight-shift system might reasonably foreseeably have an adverse impact upon the health and personal situations of bargaining unit employees. Specifically, it might reasonably be anticipated that the increase in night-shift assignments would cause employees to become fatigued and irritable, thereby decreasing their reaction time in critical situations and increasing their usage of sick leave. Further, the excessive night-shift work might reasonably create serious conflicts in employees' marital and family relationships. In addition, the reduced size of shifts might reasonably foreseeably cause hardships for employees who needed particular days off each week to attend college classes.*7 The new system might reasonably be foreseen to adversely affect employees who had been actively involved in religious, civic, and social functions.

On or about August 27 or 28, 1983, Lopez found a copy of a routing slip dated August 26, 1983 in his mailbox which was addressed to all supervisors from APAIC Fulgham. The slip stated that effective September 4, 1983 the shift and rotation schedule would be further revised. Pursuant to this revision, the new shifts in the proper order of rotation were listed as follows: 11:00 p.m.-7:00 a.m., 3:00 p.m.-11:00 p.m., 4:00 p.m.-12:00 a.m. or 5:00 p.m.-1:00 a.m., 7:00 a.m.-3:00 p.m., and 6:00 a.m.-2:00 p.m. (signcutting shift). Thus, this new five-shift schedule changed the former eight-shift schedule by eliminating the following three shifts: (1) 10:00 p.m.-6:00 a.m., (2) 2:00 p.m.-10:00 p.m., and (3) 6:00 a.m.-2:00 p.m. (regular day shift). Under this system, employees were assigned to work six weeks of consecutive night shifts and four weeks of day shifts. The new schedule was in fact implemented on September 4, 1983. Lopez testified that the slip had been put in his box sometime when he was on leave and that he did not discover it until on or about August 27 or 28, 1983. AFGE Local 2455 did not request to bargain and no bargaining occurred over the shift and rotation change that was implemented on September 4, 1983.

The record establishes that, prior to the May 29, 1983 and September 4, 1983 shift changes, Respondent had made changes and adjustments in shifts, including the establishment and removal of specific shifts (commando, train, etc.). However, none of the previous changes or adjustments were of the magnitude nor so all affecting as the changes that are subject of the instant case.

The May 29, 1983 and September 4, 1983 shift changes were made by Respondent, pursuant to the best available intelligence, in order in its view, to intercept illegal aliens as effectively as possible.

Article 28 of the Collective bargaining agreement provides:

ARTICLE 28 - Tours of Duty (Border Patrol Council)

A. The parties to this agreement recognize that the Agency must, to carry out its mission, vary tours of duty. In the interest of good employee morale, it is agreed that changes in an employee's scheduled hours of duty shall be kept to the minimum necessary to accomplish the mission of the Agency.

B. Assignment to tours of duty shall be posted five days in advance in the appropriate work area covering at least a two-week period.

C. Except in an emergency, the Agency agrees to schedule eight (8) hours between changes in shifts, and when practical will schedule more time between shifts.

D. Any employee may retain a carbon copy of his DJ-296 and/or Form I-50 if he so desires.

E. The Agency agrees that maximum effort will be made to assign consecutive days off duty.

F. The administrative workweek shall be seven consecutive days, Sunday through Saturday.

G. Breaks in working hours of more than one hour shall not normally be scheduled in any basic workday.

H. When practical, an employee shall be given

24 hours' advance notice of individual shift changes. Exceptions to this provision may be made where there is mutual agreement between the employees and supervisors involved. Individuals involved in a change of tour should be notified of the reasons for the change.

I. Where mutually agreeable to all employees affected employees may trade shifts out of the normal rotation consistent with the needs of the Service.

Discussion and Conclusions of Law

General Counsel of the FLRA alleges that Respondent violated sections 7116(a)(1) and (5) of the Statute by implementing revisions and changes in shift and rotation schedules at the Laredo Border Patrol Station on May 29, 1983 and on September 4, 1983 without providing AFGE Local 2455 proper notice and without bargaining concerning the revisions and changes and without bargaining over the procedures to be observed in implementing the changes and appropriate arrangements for adversely affected employees.*8

The General Counsel of FLRA recognizes that the establishment of a shift or tour of duty involves the "numbers, types and grades of employees or positions assigned to any organizational subdivision, work project or tour of duty" within the meaning of section 7106(b)(1) of the Statute and is therefore negotiable only at the discretion of the agency. U.S. Customs Service, Region V, New Orleans, Louisiana, 9 FLRA 116 (1982). Thus it is recognized by the General Counsel of the FLRA that, absent more, the Border Patrol was not obliged to bargain concerning the substance of the substantial and far-reaching shift changes made on May 29, 1983 and September 4, 1983.*9 General Counsel of the FLRA contends that Respondent violated sections 7116(a)(1) and (5) of the Statute by making unilateral changes in shift and rotation schedules of employees at the Laredo Station during the pending of a representation case, which changes were not "required consistent with the necessary functioning of the Agency." United States Department of Justice, United States Immigration and Naturalization Service, 9 FLRA 253 (1983) enforcement denied sub nom. United States Department of Justice, United States Immigration and Naturalization Service v. FLRA. 727 F.2d 481 (5th Cir., March 19, 1984). In this case, involving the same parties as in the subject case, the FLRA held that during the pendency of the question concerning representation Respondent was obligated to maintain existing conditions of employment, except Respondent could make such changes as were required consistent with the necessary functioning of the agency. In that case the changes implemented concerned traffic checkpoints and uniforms and the Administrative Law Judge concluded that the reasons for the changes were of longstanding origin and were merely desirable, rather than essential or necessary to the functioning of the agency, and further were made during the election period because management felt the election turmoil could weaken the union's response to the changes.*10 The Court of Appeals concluded that the changes made by the agency were management rights covered by section 7106 of the Statute and that the pendency of the representation case did not negate management's right to make the changes.

In the subject case I am constrained to follow the holdings of the FLRA*11 and in so doing I conclude that, in the subject case, the shift and schedule changes made by Respondent were "required consistent with the necessary functioning of the agency." In so concluding I rely on the facts that the Border Patrol is engaged law enforcement entrusted, inter alia, with intercepting illegal aliens attempting to cross our national borders. In the judgment of the Border Patrol the shift changes made in the subject case were perceived by Respondent as necessary in order to permit the Laredo Station to effectively police the border and to perform its duties most effectively. They were not just desirable changes, they were changes deemed necessary by Respondent's officials, based on the best intelligence available, to effectively stop the maximum number of illegal aliens. Thus, noting also the period of time during which the representation case was pending, it is

concluded that the shift changes made on May 29 and September 4 were consistent with the necessary functioning of the Border Patrol as reasonably perceived by Respondent's officials. Further, since the changes were, as discussed above, covered by section 7106(b)(1) of the Statute, Respondent was not obligated to negotiate with the Council concerning the substance of the changes. Therefore, Respondent's failure to bargain concerning the substance of the shift and schedule changes did not violate sections 7116(a)(1) and (5) of the Statute.

Respondent defended its failure to negotiate concerning the substance of the scheduling changes on the grounds that the Council waived its right to negotiate concerning the schedule change by Article 28 of the collective bargaining agreement and that section 7116(d) barred processing the complaint because a grievance was filed that allegedly covered the same issues. Because of the foregoing conclusions, I need not reach any conclusions with respect to these defenses.*12

Even though, as concluded above, Border Patrol was privileged, under section 7106(b)(1) of the Statute, to refuse to bargain about the institution of the schedule changes, it nevertheless was obligated, pursuant to sections 7105(b)(2) and (3) of the Statute, to bargain over the impact and implementation of such changes. U.S. Customs Service, Region V, New Orleans, Louisiana, supra.

In the subject case, with respect to the May 29 changes, the Council raised the issue of these changes as part of the grievance and not only would that grievance reasonably have included the impact and implementation of the change, but at the April 29 meeting the Council specifically raised the adverse impact of the proposed changes. Accordingly it is concluded that, because the May 29 changes and their impact and implementation were issues raised in the grievance, section 7116(d) of the Statute bars the finding of any unfair labor practice with respect to the issues raised in the grievance.

The General Counsel of the FLRA alleges, additionally, that Border Patrol failed and refused to bargain about the impact and implementation of the September 4 schedule changes. Respondent routed a notification of these changes to AFGE Local 2455 President Lopez. The routing slip was dated August 26, 1983 and Lopez' testimony as to when he actually received it is unclear; he apparently received it on August 27 or August 28, 1983.*13 Thus the notice was given and received some seven days before the anticipated changes. There is no showing that this notice was not given sufficiently in advance of the September 4 schedule changes so as to permit the union to request to bargain and to bargain about the impact and implementation of the changes. See Department of the Interior, U.S. Geological Survey, Conservation Division, Gulf of Mexico Region, Metairie, Louisiana, 9 FLRA 543 (1982). The Council, after the timely notification was given, did not request to bargain about the September 4 changes*14 and accordingly I find Respondent did not refuse to bargain about the impact and implementation of the September 4, 1983 changes.*15

In light of all of the foregoing I conclude that Respondent did not refuse to bargain with the Council concerning the May 29 and September 4, 1983 schedule changes or about the impact and implementation of the changes and therefore did not violate sections 7116(a)(1) and (5) of the Statute. Accordingly, I recommend that the FLRA issue the following:

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 6-CA-30309 be, and it hereby is, dismissed.

SAMUEL A. CHAITOVITZ Administrative Law Judge

Dated: February 20, 1985 Washington, DC

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1. American Federation of Government Employees will hereinafter be referred to as AFGE, and the National Border Patrol Council will hereinafter be referred to as the Council.

2. The General Counsel of the FLRA's unopposed Motion to Correct the Official Transcript is hereby granted.

3. At the time, the four established shifts were as follows: 8:00 a.m.-4:00 p.m., 4:00 p.m.-12:00 a.m., 12:00 a.m.-8:00 a.m., and a variable shift from 6:00 a.m.-2:00 p.m.

4. Article 36 of the collective bargaining agreement provides that the union will be provided 30 calendar days to present its views on proposed changes. In a memorandum of understanding between the Council and INS, dated June 10, 1977, the parties agreed that the local union would be allowed 15 days to submit proposals on changes made at the district and sector levels.

5. Lopez' undenied testimony on this point was that he concurred with Chief Selzer and considered the grievance dropped. Respondent did not call Chief Selzer as a witness at the hearing. Accordingly, Lopez' testimony as to this conversation is fully credited.

6. "Signcutting" involves searching outlying areas for signs or trails of illegal aliens and tracking them down.

7. In this regard, the record established that the Respondent has, for years, encouraged employees to obtain college degrees and to otherwise further their education. Prior to the implementation of the eight-shift system, employees had no problems obtaining particular days off to attend college classes. However, after the change, there might foreseeably be an increased difficulty in obtaining requested days off; the burden was placed on these employees to find other agents who were willing to trade shifts and this might be more difficult under the new schedule and thus might interfere with the employees' ability to obtain the days off when classes were scheduled.

8. The Complaint and Notice of Hearing alleged the violations of sections 7116(a)(1) and (5) of the Statute with respect to the failure to bargain about the implementation and impact of the changes. The Complaint was amended at the hearing to allege that the Statute was also violated by Respondent's alleged refusal to bargain concerning the substance of the changes.

9. It is concluded that the shift changes made on May 29 and September 4, 1983 were so fundamental and basic that they more closely resemble the creation of a new shift than merely the changing the time an existing shift starts and ends. See U.S. Customs Service, Region V, New Orleans, Louisiana, supra. For example, on May 29 when eight shifts were substituted for four shifts it is difficult, if not impossible, to determine which of the eight shifts were new and which were the prior four with merely changed starting and finishing hours. It is noted, that such a distinction was recognized by the FLRA in U.S. Customs Service, Region V, New Orleans, Louisiana, supra.

10. See United States Department of Justice, United States Immigration and Naturalization Service, supra at 286.

11. See also Immigration and Naturalization Service, 16 FLRA 80 (1984), Immigration Naturalization Service, 16 FLRA 88 (1984).

12. In the event the FLRA concludes my prior disposition of the issue of Respondent's alleged failure to bargain concerning the substance of the schedule changes, in an error, I would reject Respondent's contention that Article 28 of the collective bargaining agreement constituted a waiver by the Council of its rights to negotiate concerning the schedule change, but I would agree that section 7116(d) of the Statute bars the findings of any violation with respect to the May 29, 1983 changes, but not with respect to the September 4, 1983 changes. The conclusions with respect to the contract waiver is based on the FLRA's decisions holding that the waiver of a statutory right must be "a clear and unmistakable waiver of bargaining rights." Cf. Immigration and Naturalization Service, 10 FLRA 202 (1982); Internal Revenue Service, 10 FLRA 182 (1982). Article 28 of the collective bargaining agreement, although recognizing that the Border Patrol will have to, on occasion, vary and change

schedules, does not constitute a clear and unmistakable waiver of any rights the Council might have to bargain about such schedule changes.

Section 7116(d) of the Statute provides, in part, that "issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice . . ., but not under both procedures." The grievance filed by the Local President Lopez on April 24, 1983 specifically raised the issue of the Laredo Station Border Patrol Agents being "divided into eight (8) units or squads headed by one supervisor." There was no explanation as to what these eight squads referred to except the eight new shifts. Although the record does not establish that Respondent advised AFGE Local 2455 about the eight new squads, the union could reasonably have learned about them in the same manner it learned about the change in shifts. Thus it would be found, if necessary, that the grievance did in fact, deal with the schedule changes effective May 29, 1983 and therefore section 7116(d) of the Statute would require that no unfair labor practice can be found with respect to substance of the May 29, 1983 schedule changes.

13. If Lopez did not receive the notification until after August 27 or 28 because he had been on leave, it was incumbent upon the union to designate someone to receive such notification and not just to await Lopez' return.

14. Although the memorandum between the Council and INS provided for 15 days' notice for changes at a local level, that was a contract provision and any breach of it should have been raised under the grievance procedure. The seven days' notice that was given was sufficient notice under the Statute.

15. In light of the foregoing conclusions I need not decide whether Article 28, Sections B-I of the contract constituted a waiver of the Council's right to bargain about the impact and implementation of schedule changes. If the FLRA were to determine that such a finding was necessary, I would conclude that these sections did not constitute a clear and unmistakable waiver of the Council's right to negotiate concerning the impact and implementation of major schedule changes; rather, these sections merely deal with the requirements when an individual employee's schedule is changed.

